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January 21, 1998

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

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Re: *Ex Parte Notice*  
In the Matter of Advanced Television  
Systems and Their Impact Upon the Existing  
Television Broadcast Service  
MM Docket No. 87-268

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Ms. Roman Salas:

The Association for Maximum Service Television ("MSTV") hereby notifies the Commission that MSTV Senior Vice President Victor Tawil and MSTV counsel Jonathan Blake met with David Siddall and Anita Wallgren, legal assistants to Commissioner Ness, and separately (along with MSTV counsel Ellen Goodman) with Paul Misener, legal assistant to Commissioner Furchtgott-Roth, on January 16, 1998. The discussions focused on the use of DTV coordinating committees and other steps to speed and smooth the DTV implementation once the DTV Table is adopted (all previously outlined in this proceeding). At the meeting with Mr. Misener, questions arose about the Commission's authority to use DTV coordinating committees in the processing of DTV applications and other implementation matters, and whether such committees would be subject to the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix. The attached memo provides a brief treatment of this issue.

Respectfully submitted,



Ellen P. Goodman  
Attorney for MSTV

Attachment

cc: Chairman and Commissioners  
Messrs. Misener, Siddall, Stewart, Franca  
Ms. Wallgren

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## MEMORANDUM

This memorandum is in response to questions from Commission staff about the FCC's authority to rely on specifically authorized private coordinating committees for technical information and certification, while retaining ultimate decisionmaking authority. The Commission's use of frequency coordination committees is longstanding (*e.g.*, broadcast auxiliary services, private land mobile services), and was expressly endorsed by Congress in the Communications Amendments Act of 1982 in the context of private land mobile and fixed services (codified at 47 U.S.C. § 332). At the same time, Congress clarified that such frequency coordinating committees are not subject to FACA.

As the Commission recognized in this proceeding in another context (*see Fourth Report & Order*, 11 FCC Rcd. 17771 (1996)), FACA applies only under a narrow set of circumstances. In short, FACA applies when the Commission establishes an advisory committee to make policy recommendations as a group (*see, e.g., Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898, 914-5 (D.C. Cir. 1993)) or when the Commission actually controls or manages an advisory committee (*see, e.g., Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446, 1450-51 (D.C. Cir. 1994)).

The DTV coordinating committees that MSTV and other broadcasters envision would not be subject to FACA. The coordinating committees would provide strictly technical information to the Commission and to licensees and would not, in the sense of FACA, be "established" by the Commission.<sup>1/</sup> Nor would the committees, in the sense of FACA, be "utilized" by the Commission. The Commission would not manage or control the DTV coordinating committees, but would itself retain ultimate decisionmaking authority on the DTV application and implementation matters.

The details about how the DTV coordinating committees should function need to be worked out in view of FACA and other matters. A petition for rulemaking, filed by the Broadcasters Caucus, that sets out many of these matters has been pending since January 10, 1997. MSTV urges the Commission to issue a notice of proposed rulemaking based on this petition in which the Commission would propose to: give substantial weight to the committees' findings, provide objective technical criteria for the committees to follow, encourage the use of such committees to facilitate the DTV roll-out, provide that any DTV coordinating committees should be available for the use of low power television stations and translators as well as full power stations, ensure that the committees are neutral and representative, ensure that the charges are cost-based, and take other steps to ensure that use of the committees speeds the processing of DTV applications and other implementation matters. In addition, MSTV has urged the Commission in the Memorandum Opinion & Order released in this proceeding to endorse the concept of DTV coordinating committees as described above and forecast the next steps.

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<sup>1/</sup> Where, in past filings, MSTV has urged the Commission to "establish" DTV coordinating committees, we did not mean to suggest that the Commission should "establish" such committees within the meaning of FACA. To be clearer, what we have meant is that the Commission should establish the framework in which the DTV coordinating committees can function and be most useful. In fact, our past filings have stated that the coordinating committees should not and need not be subject to FACA. *See Broadcasters Proposed ATV Allotment Assignment Approach*, MM Docket No. 87-268 (Jan. 13, 1995) at n.46 ("This is because the committees will be formed privately rather than by the government, will receive no federal funds, will not be amenable to strict management by agency officials and, therefore, will not be 'established or utilized' by an agency")(citing FACA and case law).